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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REGINA GONZALES, Defendant and Appellant.	E062986 (Super.Ct.No. FELJS1403635) OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R. Balderrama, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

On June 25, 2014, defendant and appellant Regina Gonzales was found to be a mentally disordered offender (MDO)[1] by the Board of Prison Terms (BPT) under the criteria of Penal Code[2] section 2962. Defendant filed a petition in the San Bernardino County Superior Court pursuant to section 2966, subdivision (b), contesting that determination. A jury upheld the BPT's determination. On appeal, she contends there is insufficient evidence to sustain the MDO commitment. She further charges the prosecutor with misconduct during closing argument. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On December 14, 2012, defendant got into an argument with her father. She was enraged, repeatedly punched him in the head, then retrieved an object from the kitchen and hit him with it. When Officer Francisco Mora responded to the incident, he found defendant's father with bumps, bruises, bloodshot eyes, a flushed face and slurred speech. Pursuant to a plea agreement, on December 26, 2012, defendant was convicted of assault with a deadly weapon and sentenced to three years in prison. According to the probation officer's report, defendant's father said that defendant "was bipolar" and he did not want her to go to prison.

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[1] "'The Mentally Disordered Offender Act (MDO Act), enacted in 1985, requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment . . . until their mental disorder can be kept in remission. [Citation.]'" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061, disapproved on another ground in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2 (*Harrison*).)

[2] All further statutory references are to the Penal Code.

Defendant was incarcerated, and by May 2013, she had declined to take her medication. On May 30, 2013, defendant was transferred to the California Institution for Women (CIW) for mental health treatment. In March 2014, defendant reported suicidal ideation and said she was experiencing visual hallucinations and paranoia. She was reported to have had general "concerns about being a weapon around others and herself." She admitted that she was experiencing "racing thoughts and disorganized thinking," symptoms of bipolar disorder. When defendant began hallucinating and becoming paranoid, she asked for, and was given, admission to a mental health crisis bed.

Shortly after defendant was moved to a mental health crisis bed, Dr. Rick Bjorklund, a psychologist, interviewed her. She told Dr. Bjorklund that when she was fighting with her father it was "like, not him, something in between us . . . ." She also reported being depressed and having used substances just prior to the offense. At the time of the interview, defendant did not demonstrate signs or symptoms of a mental disorder; however, she did report a "mood disturbance" a short time earlier.

On June 25, 2014, the BPT determined that defendant was an MDO pursuant to section 2962 and sustained the requirement of treatment. On July 31, 2014, defendant filed a petition with the trial court challenging the BPT's determination. (§ 2966, subd. (b).) A jury trial commenced on December 18, 2014.

A. Prosecution Evidence.

The prosecution presented the testimony of Drs. Louis Alvarez, Robert Record, Trayci Dahl, and Susan Torrey, all of whom had reviewed defendant's medical records, criminal history, and prior MDO evaluations. They evaluated defendant and determined

that she met the statutory criteria for civil commitment as an MDO. The criteria include the following: (1) whether defendant had a severe mental disorder; (2) whether defendant committed a qualifying violent offense; (3) whether defendant's disorder was not in remission or could not be kept in remission without treatment; (4) whether defendant's disorder was a cause of or an aggravating factor in the commission of her qualifying offense; (5) whether defendant had been in treatment for the disorder for at least 90 days within the year prior to the request for release on parole; and (6) whether by reason of the disorder she represented a substantial danger of physical harm to others. (§ 2962; *Harrison*, *supra*, 57 Cal.4th at p. 1218.)

Dr. Alvarez, a physician and psychiatrist at CIW, testified regarding criterion 5, that defendant had been receiving treatment for bipolar affective disorder with "depressed phase and psychotic features" for at least 90 days prior to the BPT's hearing. He described the disorder as a serious mental illness that involves mood fluctuations in which a patient can go from "being quite stable over a period of weeks to becoming sometimes quite . . . angry . . . [and] impulsive." Thus, a patient may experience "psychotic features" one moment and appear stable and calm the next. "Psychotic features" include mood instability, lack of insight, periods of hallucinations, and impulsivity that can lead to violent behavior. Symptoms of bipolar disorder include racing thoughts and disorganized thinking, both of which defendant experienced in March 2014, along with thoughts of harming herself and others.

Dr. Record, a psychologist and independent evaluator for the Department of Corrections, testified that defendant had a history of hallucinations, mental health

hospitalizations, prior suicide attempts, and drug abuse. Based on the nature of defendant's behavior and hallucinations, he diagnosed her with psychotic disorder not otherwise specified and substance abuse with institutional remission, explaining that the only reason defendant was not using drugs was because she was in a controlled environment. Dr. Record opined that defendant had bad judgment because, despite her acknowledgment that she had a history of mental health issues, she did not believe that she needed medication. The doctor noted that when defendant was taken off medication, she would deteriorate and hallucinate.

Dr. Record opined that defendant's assault conviction constituted a qualifying offense such that her mental disorder was an aggravating factor in the commission of the offense. He explained that defendant admitted that at the time of the offense, she believed her parents were not her real parents and that her real parents were dead. Defendant expressed the same delusion to Dr. Record during their May 12, 2014, interview, adding that she was hallucinating during the fight with her father, believing that people were threatening them. Dr. Record also noted the police report of the offense included the victim's statement that defendant was bipolar and needed medical assistance. Dr. Record opined that defendant's mental disorder was not in remission and that she would not take her medication outside of a controlled environment. He further opined that because she continued to have severe hallucinations about people trying to kill her, she posed a substantial danger to herself and others.

Dr. Dahl, a psychologist for the Department of State Hospitals, interviewed defendant in April 2014. She testified that defendant had a severe mental disorder,

showing symptoms of bipolar disorder and schizoaffective disorder, bipolar type. Dr. Dahl noted that defendant had been hospitalized three times for psychiatric treatment and that she had reported a history of excessive energy, decreased need for sleep, racing thoughts, grandiose beliefs, sexual promiscuity, depression and nightmares. During her interview, she spoke at a rapid pace, appeared distracted or preoccupied, would laugh at random times, and said she had experienced auditory hallucinations a few days prior to seeing the doctor. Based on defendant's statements that she had been released from a psychiatric hospital a few weeks prior to the offense, had heard voices during the fight with her father, and had experienced a reduced need for sleep a few days prior to the offense, Dr. Dahl opined that the underlying offense was aggravated by defendant's mental disorder. The doctor further opined that defendant's mental disorder was not in remission and that she posed a substantial risk of danger to others. She based this opinion on the following: (1) in the months leading up to her hospitalization (from May 2013 to March 2014) defendant refused to take her medication; (2) by March 2014, she decompensated to the point where she required hospitalization; and (3) during this time, she reported having thoughts about hurting others.

Dr. Torrey performed an independent evaluation of defendant on May 7, 2014. She testified that defendant experienced elevated moods which were consistent with mania and depression. She displayed overproductive speech, illogical and disorganized thoughts, and auditory hallucinations. Dr. Torrey opined that defendant's severe mental disorder was a factor in her underlying offense because she acted completely irrationally in escalating "what might have been a minor family squabble." In the doctor's opinion,

defendant's mental disorder was not in remission and she had a history of treatment noncompliance.

The parties stipulated to criterion 5, that defendant had received 90 days of psychiatric treatment during the last year.

B. Defense Evidence.

The attorney who represented defendant in 2012 during the plea bargaining process for the commitment offense testified that defendant did not appear to be delusional or suffering from hallucinations during that time. Officer Mora testified that at the time he responded to the commitment offense call, defendant's father was intoxicated; however, the officer never administered any test to confirm his belief, and he agreed that the slurred speech or unsteady gait could be attributed to the head injuries. Dr. Bjorklund testified that defendant met all but one of the criteria for commitment as an MDO. He agreed that she suffered from and had a history of a severe mental disorder, bipolar and psychotic disorder; her mental illness was an aggravating factor in the commitment offense; her disorders were not in remission; and she had been refusing to take her psychiatric medication. However, Dr. Bjorklund opined that defendant did not pose a substantial risk of danger to others because she did not seem dangerous to him during the interview and she had not recently acted out violently.

II. ANALYSIS

A. Sufficiency of Evidence.

Defendant contends there was insufficient evidence (1) that her "commitment offense was the result of or aggravated by the same serious mental disorder for which she

was subsequently diagnosed and treated," or (2) "that the same mental disorder caused serious volitional impairment resulting in her posing a substantial risk of physical danger to others if released."

1. Standard of Review.

"In considering the sufficiency of the evidence to support MDO findings, an appellate court must determine whether, on the whole record, a rational trier of fact could have found that defendant is an MDO beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People, and drawing all inferences the trier could reasonably have made to support the finding. [Citation.] '"'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the [finding] is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. . . .' [Citation.]"' [Citations.]" (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083 (*Clark*).)

2. There Was Sufficient Evidence That Defendant's Mental Disorder at the Time of the Hearing Was a Cause or Aggravating Factor in Her Underlying Offense.

Defendant first claims there was insufficient evidence establishing that her current mental disorder was the same mental disorder that caused or was an aggravating factor in her committing the underlying offense. We disagree.

"A qualified expert is entitled to render an opinion on the criteria necessary for an MDO commitment, and may base that opinion on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject. [Citations.]" (*People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569.) Here, Drs. Record, Torrey, Dahl and Bjorklund all agreed that defendant's mental illness was an aggravating factor in the commitment offense based on their review of her history and interview with her. Defendant's expert concluded that defendant had current symptoms of psychosis even though she was compliant with her required treatment medication. Nonetheless, defendant faults the doctors for relying on "multiple layers of hearsay" from a layperson, namely, defendant's father's statement in the police report that defendant was bipolar. Contrary to defendant's assertion, the experts did not rely solely on statements in the police report. Rather, they considered defendant's interview statements that she had been experiencing delusions during the offense, her history of hallucinations, mental health hospitalizations, prior suicide attempts, and drug abuse. The experts agreed on defendant's symptoms, which are consistent with bipolar disorder or schizoaffective disorder. Dr. Alvarez testified that defendant had been receiving treatment for bipolar affective disorder with depressed phase and psychotic features for at least 90 days prior to the BPT's hearing.

Defendant further notes that her attorney for the guilty plea testified that she did not appear delusional at the time of the plea. The fact that defendant acted normal two weeks after the commitment offense, during her plea hearing, does not discount her mental state at the time of the offense. As Dr. Alvarez explained, defendant's disorder is

a serious mental illness that involves mood fluctuations in which a patient can go from "being quite stable over a period of weeks to becoming sometimes quite . . . angry . . . [and] impulsive." Thus, a patient may experience "psychotic features" one moment and appear stable and calm the next.

In light of the evidence that defendant's behavior at the time of the commitment offense was consistent with her recent behavior, there was no reason for the jury to believe that her current mental disorder was not the same disorder that was an aggravating factor in the assault.

3. There Was Sufficient Evidence That Defendant Represented a Substantial Danger of Physical Harm to Others.

Defendant contends there was insufficient evidence that her mental disorder rendered her seriously dangerous. She points out that there is no record of her physically harming anyone while confined in prison, she is aware of her mental disorder and sought help when symptoms surfaced, and she has no history of violent or assaultive behavior, despite the dangerous nature of prison. We find ample evidence from which the jury could conclude that defendant posed a serious threat of physical harm to others.

With the exception of Dr. Bjorklund, the other experts agreed that defendant represented a substantial danger of physical harm to others, due to her mental disorder. According to the evidence, defendant has a criminal history of assault on peace officer and assault with deadly weapon. After refusing to take her medication, she suffered from delusions and hallucinations, and made vague threats of harm to people around her. She acknowledged that she had thoughts about harming herself and others. Defendant's

characterization of her thoughts about harming others followed by her seeking help and a mental health crisis bed as her expressing "concerns for herself and others in vague terms," is misplaced. At the time defendant sought help she was in a controlled environment. Previously, when she was not in prison, she did not seek help when experiencing these same thoughts. Instead, she acted upon them. Ultimately, the jury weighed the witnesses' testimony and chose to believe the prosecution's experts. We must accord due deference to the jury's evaluation of credibility. (*Clark*, *supra*, 82 Cal.App.4th at p. 1083.)

Notwithstanding the above, defendant further asserts that there is insufficient evidence that her "mental disorder causes a serious volitional impairment rendering her dangerous beyond her control." Defendant's discussion is based on a faulty premise. She relies on *Kansas v. Hendricks* (1997) 521 U.S. 346 (*Hendricks*), *Kansas v. Crane* (2002) 534 U.S. 407 (*Crane*), *In re Howard N.* (2005) 35 Cal.4th 117 (*Howard N.*), and *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 (*Hubbart*). However, these cases are inapposite because they involve the civil commitment of defendants under the Kansas Sexually Violent Predators Act and/or the nearly identical California Sexually Violent Predators Act (collectively, the SVPA). (*Crane*, *supra*, at pp. 409, 411; *Howard N.*, *supra*, at pp. 122-123, 126-128; *Hubbart*, *supra*, at pp. 1142, 1158 & fn. 24.) The SVPA explicitly requires the finding of a mental abnormality that makes it difficult for the person to control his or her dangerous behavior. (*Hendricks*, *supra*, at p. 358; *Crane*, *supra*, at pp. 409-411; *Hubbart*, *supra*, at p. 1158.) Simply stated, the SVPA is a different statutory scheme from the MDO statutes under which defendant was committed.

(*People v. Putnam* (2004) 115 Cal.App.4th 575, 581.) With regard to the element at issue, the MDO law only requires a finding that "the prisoner represents a substantial danger of physical harm to others." (§ 2962, subd. (d)(1); see *Clark, supra*, 82 Cal.App.4th at pp. 1075-1076.) Thus, contrary to defendant's claim, there is no statutory requirement of a finding of difficult to control dangerous behavior, as in the SVPA.

Viewing the evidence in the light most favorable to the People, we conclude that there was sufficient evidence to support defendant's commitment.

B. Prosecutorial Misconduct.

Defendant charges the prosecutor with misconduct during closing argument. She asserts that on three separate occasions, the prosecutor discussed defendant's failure to call certain logical witnesses. We discern no misconduct.

1. Further Background Information.

During closing argument, defense counsel argued that the prosecutor failed to prove its case because he did not call defendant's father, mother, or the probation officer to testify.[3] In rebuttal, the prosecutor informed the jury that neither party was required to call all of the potential witnesses in the case, adding, "And, you know, if it was, you know, why didn't [defense counsel] call Ms. Gonzales?" Defense counsel objected on the ground that the prosecutor shifted the burden of proof. The trial court overruled the

[3] Defense counsel ended with the following: "For crying out loud, bring Mr. Gonzales in so that the quality and/or the quantity of the evidence becomes so overwhelming that it leaves you with an abiding conviction that the charge is true; you don't feel regret, and you feel at peace, and you don't have any questions about, why didn't you do this?"

objection, stating, "Well, the People have the proof beyond a reasonable doubt; however, I believe that the D.A. can comment on the other party's failure to call certain witnesses, so I'll leave it at that." Later on, the following exchange occurred:

"[THE PROSECUTOR:] And with regard to not calling the father, not calling the mother, that's akin to [defense counsel] not calling the probation officer to clarify.

"[DEFENSE COUNSEL]: Objection. Burden shifting.

"[THE COURT]: I'll overrule that based on my prior decision.

"[THE PROSECUTOR]: —not calling Ms. Gonzales to tell us exactly what she was thinking.

"[DEFENSE COUNSEL]: Objection, you Honor. Burden shifting, again.

"[THE COURT]: I'll overrule it.

"[THE PROSECUTOR]: —not calling Ms. Gonzales to tell us what her mental state was, even though she did in fact tell the doctors."

2. Analysis.

A prosecutor has a duty to prosecute vigorously, but he must refrain from improper methods calculated to produce a wrongful conviction. (*Berger v. United States* (1935) 295 U.S. 78, 88.) It is generally permissible for a prosecutor to comment on the state of the evidence or on the defendant's failure to call logical witnesses, introduce material evidence, or rebut the prosecution's case. (*People v. Medina* (1995) 11 Cal.4th 694, 755 (*Medina*); see *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 (*Gonzales*) ["it is neither unusual nor improper [for a prosecutor] to comment on the failure to call logical witnesses"].) However, a prosecutor may not suggest that "a defendant has a duty

or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340 (*Bradford*).)

Under the federal Constitution, a prosecutor commits misconduct by using "'deceptive or reprehensible methods to persuade the jury'" that "'infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.]'" (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Under the state Constitution, a prosecutor commits misconduct even when his actions "do not result in a fundamentally unfair trial." (*Id*. at p. 359.) "[W]hen the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a *reasonable likelihood* that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*), italics added; see *People v. Crew* (2003) 31 Cal.4th 822, 839 ["A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct."].)

In *People v. Cook* (2006) 39 Cal.4th 566, a criminalist testified that the bullets used in two murders had been fired from the same weapon. (*Id.* at p. 607.) The court held that the prosecutor did not impermissibly seek to shift the burden of proof by asking the criminalist "if the defense could have subjected the autopsy bullets to its own testing by an independent laboratory." The court observed that "the prosecutor did not ask whether the defense had a duty to do independent testing, merely whether the defense had

an opportunity to do so." (*Ibid.*) The court concluded that "[p]ointing out that contested physical evidence could be retested did not shift the burden of proof." (*Ibid.*)

In *Bradford, supra*, 15 Cal.4th 1229, the prosecutor pointed out in argument that no evidence had been introduced by the defense on the issue of whether a stain on a mat in the trunk of the defendant's vehicle was blood. (*Id*. at pp. 1338-1339.) The prosecutor also noted that "the defense did not call an expert witness to testify contrary to the conclusions reached by the coroner with regard to the time frame of [the victim's] death, although defendant 'certainly is free to call his own witness to testify to those facts.'" (*Id.* at p. 1339.) The court held that the prosecutor's arguments did not impermissibly shift the burden of proof to the defendant. (*Id.* at p. 1340.)

However, the prosecutor's statements in closing argument must be viewed in context with the remainder of summation. (*Medina*, *supra*, 11 Cal.4th at p. 756.) While defendant views the prosecutor's comments as burden shifters, we see them as acceptable responses to defendant's argument. Defense counsel argued that the absence of certain witnesses (defendant's mother, father, and the probation officer) resulted in a lack of credible evidence regarding defendant's mental health. In response, the prosecutor pointed out that defendant also had the ability to call those witnesses if she so chose. Such action by the prosecutor does not amount to misconduct. (*Gonzales, supra,* 54 Cal.4th at p. 1275 ["it is neither unusual nor improper to comment on the failure to call logical witnesses"]; *People v. Cornwell* (2005) 37 Cal.4th 50, 90, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Even if we accept defendant's view of the prosecutor's comments, the record shows that the prosecutor repeatedly noted he had the burden of proof. Defense counsel also repeatedly emphasized that the prosecutor had the burden of proof. The prosecutor reminded the jury that the evidence is what the witnesses testified to, not what he or defense counsel said, and further emphasized that the jury should "only consider the facts that were testified to from the witness stand, the exhibits that were admitted by the judge at the conclusion of the case, and of course the law that the judge instructed you on." The trial court instructed the jury it was required to follow the law as the court stated it, not as the attorneys argued it, and the People bear the burden of proving that defendant is a mentally disordered offender beyond a reasonable doubt.

A prosecutor's misstatement of the reasonable doubt standard is harmless error when the trial court instructs the jury with a proper reasonable doubt instruction because the jury is presumed to have understood and followed the trial court's instructions. (*Morales*, *supra*, 25 Cal.4th at p. 47.) Here, as noted, the trial court instructed the jury that it must apply the law as stated in the instructions, and those instructions would control if the attorneys made any contrary statements. The trial court correctly instructed the jury concerning the reasonable doubt standard and the prosecutor's burden of proof. We assume the jury followed the instructions given, and we therefore conclude it was not reasonably probable the jury was misled by the prosecutor's statements, even if those statements were erroneous.

III. DISPOSITION

We affirm the judgment.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

SLOUGH
J.